Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

SHAWN R. WASHBURN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the 7th Circuit erred in holding that Washburn, as a bailor, lacked standing to challenge a warrant that allowed the seizure and search of "any vehicle traveling with or accompanying" two separate listed vehicles by abandoning the luggage he provided to Morgan, the bailee, for transport to Ohio for the drug business transaction ?

2. Does the exclusionary rule's "all or nothing" approach merit modification to allow courts to uphold a proper conviction and simultaneously remedy multiple, material false statements by reducing a prison sentence as a prophylactic remedy for police misconduct? In other words, is simply ignoring police misconduct the appropriate remedy when a defendant has proven by clear and convincing evidence that police officers have offered to a trial court multiple, material false statements during a suppression hearing, or may the Court adopt a new, intermediate remedy of allowing a conviction to stand while vacating part or all of the prison sentence in order to deter police misconduct?

3. In order to deter the trial court success of police perjury, is a new remedy needed in warrantless automobile search exception cases that would limit a court's consideration of probable cause determining facts to those facts that were recorded by police within 48 hours of the search?

4. If the warrantless search in this case were limited to facts recorded within 48 hours of the search and not to those that surfaced for the defense for the first time during the middle of the suppression hearing six (6) months later, would probable cause have existed to seize Washburn and search his van, or even if the District Court properly included all of the new facts that were inserted into the suppression hearing, did probable cause exist to seize Washburn at gunpoint and search his van without a warrant?

CORPORATE DISCLOSURE STATEMENT

DISCLOSURE STATEMENT
Appellate Court No: 03-3325

Short Caption: SHAWN R. WASHBURN v. UNITED STATES OF AMERICA

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curia, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Federal Rules of Appellate Procedure 26.1 and Circuit Rule 26.1. **NOTE: Counsel is required to complete the entire statement and to use N/A for any information that is not applicable.**

The full name of every party, any parent corporation, and any publicly held company that owns 10% or more of the party's stock that the attorney represents in the case: N/A

If such party or amicus is a corporation: N/A

Its parent corporation, if any; and: N/A

A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus: N/A

The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

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This disclosure statement shall be filed in the principal brief or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. The attorney furnishing the statement must file an amended statement to reflect any material changes in the required information. The text of the statement (i.e. caption omitted) shall also be included in front of the table of contents of the party's main brief.

Attorney's Signature:

_____

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Date: December 30, 2004

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OPINIONS BELOW

The Memorandum and Order, dated May 20, 2003, of the United States District Court for the Northern District of Indiana, South Bend Division, the Honorable Robert L. Miller presiding, that denied Washburn's Motion to Suppress, is reproduced in Appendix A to this Petition.

The Memorandum and Order, dated August 1, 2003, of the United States District Court for the Northern District of Indiana, South Bend Division, the Honorable Robert L. Miller presiding, that denied Washburn's Motion to Correct Error, is reproduced in Appendix B to this Petition.

The Final Order of Judgment and Sentencing and the Sentencing Memorandum, dated August 25, 2003, of the United States District Court for the Northern District of Indiana, South Bend Division, the Honorable Robert L. Miller presiding, is reproduced in Appendix C to this Petition.

The opinion of the United States Court of Appeals for the Seventh Circuit, as it relates to the Petitioner, is reported

at 383 F.3d 638 (2004). It is reproduced in Appendix D to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 9, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

1. The 4th Amendment to the U.S. Constitution

2. 18 U.S.C. §1254. Courts of Appeals; certiorari; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

i. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree;

ii. By certification at any time by a court of appeal of any question of law in any civil; or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

STATEMENT OF THE CASE

Petitioner Shawn R. Washburn ("Washburn") was charged with and plead guilty to possession of methamphetamine with intent to deliver on May 8, 2003 [21]. (Bracketed numbers reflect entries on the criminal docket sheet. See Record ("R"), pp. 1-8).1 Washburn's guilty plea agreement with the government allowed him to litigate and appeal any adverse ruling on his motion to suppress [42]. The district court held the evidentiary hearing on May 12 and 13, 2003 [25, 26], and on May 20, 2003, the district court denied the motion to suppress [30] and R., pp. 94-105. Washburn filed a motion to correct error which was also denied on August 1, 2003 [40]. The district court sentenced Washburn on August 22, 2003 and directed the clerk to prepare a notice of appeal [42]. Washburn appealed to the 7th Circuit and on September 9, 2004, the 7th Circuit upheld the

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1 The Record ("R") is the Appendix that was submitted to the Court of Appeals is not being attached to this petition, but is available upon request from this Court.

District Court's denial of Washburn's Motion to Suppress. The 7th Circuit set a mandate date of October 1, 2004.

STATEMENT OF FACTS

On November 5 and 6, 2002, Defiance County, Ohio police officers were investigating methamphetamine dealing between Ohio and Elkhart, Indiana (T, 62).2 The Ohio officers came to Elkhart on November 5 and apparently observed Thomas Wright, a drug dealing suspect, connected to a gold Ford and a green Chrysler that they included in an anticipatory warrant that they obtained at 11:30 a.m. on November 6 (R, 70). They had information about a drug transaction that was planned for November 6, 2003 (T, 25) and that would be originating in Elkhart and culminating in Ohio; therefore they obtained an anticipatory search warrant (T, 26, R, 70-73).

The police stopped three vehicles in Ohio around noon on November 6, 2003 (T, 27, 30), the two that were

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2 "T" refers to the transcript of the Motion to Suppress hearing which will be submitted to the Court upon request.

listed in the warrant and a third blue Dodge Avenger driven by Brian Greathouse ("Greathouse") (T, 43, 53) that was not listed (T, 42-43). Elkhart police officer Barry Snyder ("Snyder") testified that he observed the blue Dodge Avenger at Thomas Wright's house on November 6th early in the morning (T, 84); however, this vehicle was not listed in the warrant. Snyder testified that the blue Dodge Avenger was listed in the warrant (T, 125-6). Greathouse had committed no traffic violations in Ohio when he was pulled over (T, 53). In the trunk of this blue Dodge Avenger (T, 28), Ohio police officers recovered methamphetamine in Washburn's suitcase that he had provided to Morgan (T, 42, 79), without having obtained a separate warrant for Washburn's suitcase (T, 79-80).

One arrested individual, David Morgan ("Morgan"), agreed to cooperate and allegedly made a few calls to Washburn starting at 5:00 p.m. (T, 71) that were recorded on a micro cassette player that could be obtained at any Radio Shack (T, 32, 54-55). Ohio Officer Wisecup testified that he

could use a micro cassette recorder to record either an informant or a judge for a telephonic search warrant (T, 55-57). Officers never checked the phone number Morgan called in the phonebook to verify if it returned to Washburn (T, 34, 54). Morgan had never before been used as an informant and Washburn's name had never arisen as a suspect prior to November 6, 2002 (T, 58).

At no time during the phone conversations did either Morgan or Washburn mention any drugs other than a margarita (T, 75). Officers could only hear what Morgan was saying and did not listen to the tapes until later on (T, 73). They planned to meet at the Westin around 7:00 p.m. on November 6, 2003. (See the tapes referred to in the government's Ex. 10, T, 36, 60). A police report stated, "Washburn said he had the twelve pounds in the van with him;" (R, 74) however, at no time during the phone conversations did Washburn or Morgan mention "pounds" nor which of Washburn's four vehicles he would be driving. (Published tapes referred to in T, 36 and T, 58-59, 199). The

only person who identified the other person on the phone calls was Morgan (T, 37).

Wisecup testified that Morgan mentioned one of Washburn's four vehicles, which was a "white Chevy conversion van with like wood-grain trim" possibly on the outside (T, 59). "Conversion" vans are very common in Elkhart County, Indiana because they are manufactured there (T, 142). Ohio officer Vandemark, the second to testify in the suppression hearing, added "full-size," "very nice," "wood trim that would be seen inside," and a black (T, 75-76) "duffle bag that would be containing meth" when you looked through the window of the van (T, 70, 71). Morgan did not provide Washburn's license plate number (T, 80).

Snyder, who apparently never spoke with Morgan that day, added during the suppression hearing that Morgan had stated that Washburn's van had graphics (T, 88). This information was not contained in any police report. Snyder testified that the Ohio officers told him Morgan described the bag as "black" (T, 89); however, in his police report Snyder

described the bag as "black and purple." Elkhart Officer Towns, in his search warrant application[3] described the bag "as being a large trash bag. A large trash bag can be seen by looking into the white Chevrolet van registered to Washburn" (R, 46).

Vandemark stated that his understanding that he learned through debriefing, was that Thomas Wright, one of the 5 individuals arrested in Ohio, "thought the supplier was Shawn Washburn" (T, 67, 89). Wright's basis of knowledge was never established in the hearing. Vandemark testified that Morgan told him that Washburn "possibly" could have a gun, although Morgan never saw one and Morgan's statement about a "possible" gun never surfaced in any police report (T, 76-78).

Snyder returned from Ohio around 5:30 - 6:00 p.m. (T, 89) and was waiting in Elkhart to intercept Washburn (T,

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[3]Washburn alleged that the search warrant (R, 46-7) was defective for many reasons including the lack of any affidavit. The district court ignored the warrant and upheld the search based upon the automobile exception alone. (R, 94-105).

38). Ohio officers and Snyder had cell phones to stay in contact (T, 38, 90). No officer attempted to obtain a telephonic search warrant either from the initial 5:00 p.m. (T, 78) contact with Washburn before his 7:00 p.m. arrival or afterward before the search of the van at 9:05 p.m., even though the police have the judges' telephone numbers (T, 57, 137; R, 46). Indiana law allows telephonic search warrants (T, 138). Snyder had access to micro cassette recorders and he used them "all the time." (T, 139). Additionally, no Ohio officer obtained any physical description of Washburn according to Vandemark (T, 78-79). However, Snyder later claimed he had a description of a "white male" (T, 95).

Snyder arranged for several officers to intercept Washburn at 7:00 at the Westin Plaza Hotel in Elkhart (T, 91). Washburn arrived at the hotel and legally parked between two entrances to the hotel (T, 92, 125). The Westin Plaza Hotel is a place "regularly used for residential purposes" where people stay not only overnight, but also for weeks at a time (T, 125). Snyder testified that Det. Rose

Privett ran the van's license plate around 7:05 prior to Washburn's seizure at gun point (T, 93, 150-3). The Elkhart business records indicated that the plate was not run until 7:18 or :19 (R, 92; T, 190). Upon being confronted with the business record, Snyder suggested that someone may have run the plate a second time (T, 154). No evidence existed for a second license plate check. Snyder also added that C.R. 6 was the address for the van and testified that he also heard from the Ohio officers that Morgan stated that Washburn lived on C.R. 6 (T, 94). The C.R. 6 info also did not appear in any police report.

Prior to seizing Washburn in the parking lot, the defense had asserted that Officers Buchmann and Rucker had initially seized a different white van in the hotel parking lot; however, officers Buchmann and Rucker failed to appear for the 2nd day of the suppression hearing (T, 135-6, 199, 229).

Snyder ordered the several officers present to seize this white male outside the van in the parking lot, whom they later learned to be Washburn. Officers order him to the

ground (T, 144) and seized his keys around 7:05 p.m. (T, 129) at gun point (T, 144-5). Elkhart detectives Mohan and Adamson were also involved at the scene, along with Ohio officers Engel and at least another Ohio sergeant and attorney (T, 145). Snyder arrived seconds later (T, 96). Washburn refused a request for consent to search the van (T, 98). Washburn was "very nice" about waiting for the police to get a search warrant (T, 99). Snyder testified that Washburn was not free to go, and if he had tried to walk away, he would have been arrested (T, 117). Washburn was escorted by uniformed officers Buchmann and Rucker and placed in the back of a squad car (T, 99).

Snyder then testified that a canine unit arrived in an half hour or less, around 7:30 to sniff the van and was then moved to another location (T, 100, 118, 168) for a total of two arrivals on the scene. The business records indicated that the Elkhart canine officer Schotts ("Schotts") was told to stay away from the hotel scene at 7:28 p.m. and did not arrive until 8:25 (R, 76, 78-85, 98-99; T, 118, 173-186). Snyder

testified that the dog alerted on the van (T, 101), but that his supervisor, Towns (who had "disappeared" (T, 126) at the time of the suppression hearing and who has now been indicted on other charges), went to get a search warrant and returned around 9:00 p.m. (T, 102). Snyder stated that he read his supervisor's warrant prior to the search and used this action to claim a Leon good faith exception to a defective warrant because the warrant appeared to be valid to him (T, 103-4, 109), even though he noticed the "trash bag" language (T, 141). Snyder and Osterday searched the van and found methamphetamine in vacuum-sealed bags (T, 105).

Snyder arrested Washburn around 9:10-15 p.m. after the search was executed (T, 109, 117-8, R, 46) when he was first read Washburn his Miranda rights.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The district court had jurisdiction over the criminal case below pursuant to 18 U.S.C. Sec. 3231. The Court of

Appeals for the 7th Circuit had appellate jurisdiction over the petitioner's appeal pursuant to 28 U.S.C. Sec. 1291.

ARGUMENT
REASONS FOR GRANTING THE WRIT OF CERTIORARI

QUESTION 1. Whether the 7th Circuit erred in holding that Washburn, as a bailor, lacked standing to challenge a warrant that allowed the seizure and search of "any vehicle traveling with or accompanying" two separate listed vehicles by abandoning the luggage he provided to Morgan, the bailee, for transport to Ohio for the drug business transaction ?

Throughout the case and during the suppression hearing, the government maintained the position that Washburn was Morgan's (the drug dealer) supplier. (T, 67, 89). An officer even testified that the suitcase where officers located the drugs in Ohio was "provided" by Washburn. The most reasonable inference from this testimony was that Washburn fronted drugs (bailed them) to Morgan who would then take them to Ohio, sell them, and return a portion of the

profits to Washburn. In essence, Washburn and Morgan were business partners.

The 7th Circuit held that Washburn abandoned the drugs and the suitcase. In this point, the 7th Circuit misapplied case law that would have required a bailor to take steps to ensure the privacy of the bailed goods because the bailor assumes the risk that a bailee would consent to a search. However, in this case, Morgan did not consent to the search. The search of Washburn's suitcase in the trunk of the blue Dodge was the product of a warrant, not consent.

A bailor retains his Fourth Amendment rights and standing to challenge a search even after he bails goods to his bailee. For example,

> "The Ninth Circuit has held that Fourth Amendment standing can be based on a shared bailor/bailee relationship. *See* [U.S. v.] Padilla, 960 F.2d at 859; United States v. Johns, 707 F.2d 1093 (9th Cir.1983), *rev'd on other grounds,* 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985). Further, the Sixth Circuit has held that a 'suitcase or briefcase is property of a kind in which an owner or bailee normally has a strong expectation of privacy.' United States v. Oswald, 783 F.2d 663, 666 (6th Cir.1986) (Emphasis added). Consequently, this court finds that because the

> Defendant purported to be a bailee of the briefcase, and because the briefcase was locked and stored in the Defendant's vehicle, he manifested a subjective expectation of privacy in the briefcase that was objectively reasonable."

U.S. v. Reeves, 798 F.Supp. 1459, *1466 (E.D.Wash., 1992), affirmed in U.S. v. Reeves, 6 F.3d 660 (C.A. 9, Wash. 1993).

> "The fourth amendment protects the 'right of the people to be secure in their persons, houses, papers, *and effects,* against unreasonable searches and seizures.' (Emphasis added.) *See* Arkansas v. Sanders, 442 U.S. 753, 762, 99 S.Ct. 2586, 2592, 61 L.Ed.2d 235 (1979) ('[L]uggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy'); United States v. Chadwick, 433 U.S. 1, 13, 97 S.Ct. 2476, 2484, 53 L.Ed.2d 538 (1977) ('[A] person's expectations of privacy in personal luggage are substantially greater than in an automobile')."

U.S. v. Wright, 706 F.Supp. 1268, *1276 (N.D.Tex., 1989).

Accordingly, Washburn, as the bailor of his suitcase, maintained his standing to challenge the Ohio search warrant.

Unless the undersigned counsel has lost portions of the record, the Ohio warrant (R., pp. 70-71) and affidavit (R., pp. 72-73) presented to the trial court are so defective as to be barely worth detailing. The affidavit only mentions that the

affiant has "reason to believe" that a gold Ford and a Green Chrysler occupied by Thomas Wright on November 6, 2002 would contain drugs. (R, 72). The affidavit does mention a statement incorporated by reference; however, unless counsel is mistaken, no incorporated statement made its way into the record.

The blue Dodge Avenger where the drugs in Ohio were found was not listed in the Ohio warrant [R, 42] and was in no way particularly described in the anticipatory search warrant as required by the 4th Amendment. When one reads Exhibit P [R, 70-71], one finds only a gold Ford and a teal green Chrysler. This search warrant is an invalid, over broad, and unparticularized general warrant, for example, because it allowed the seizure of "any vehicle accompanying or traveling with" an individual named Thomas Wright [R, 70]. Since the officers testified that the drugs were located in Shawn Washburn's suitcase [T, 79] in the trunk of the blue Dodge Avenger, Washburn has standing to challenge this search. This Court has previously determined that citizens

have an expectation of privacy in their luggage. Arkansas v. Sanders, 442 U.S. 753 (1979). U.S. v. Chadwick, 433 U.S. 1 (1977).

Because the search in Ohio was the product of a defective over broad warrant and non-particularized affidavit, the information obtained from Morgan to establish probable cause to search Shawn's van later that night constitutes the fruit of the poisonous tree and therefore taints the search in question in this case. The Ohio search warrant was facially over broad, and it lacked sufficient particularity in that it named "all cars."

QUESTION 2. Does the exclusionary rule's "all or nothing" approach merit modification to allow courts to uphold a proper conviction and simultaneously remedy multiple, material false statements by reducing a prison sentence as a prophylactic remedy for police misconduct? In other words, is simply ignoring police misconduct the appropriate remedy when a defendant has proven by clear and convincing evidence that police officers have offered to a trial court

multiple, material false statements during a suppression hearing, or may the Courts adopt a new, intermediate remedy of allowing a conviction to stand while vacating part or all of the prison sentence in order to deter police misconduct?

The problem of police misconduct is well-known and pervasive. Many scholars have called attention to this problem. Perhaps it is useful here to begin compiling the two clearly false and additional probably incorrect statements that the police made in this case during the suppression hearing.[4] [5] For example:

4"See Donald A. Dripps, Police, Plus Perjury, Equals Polygraphy, 86 J. Crim. L. & Criminology 693, 698 (1996) (asserting that the incidence of police perjury is common); ... (noting the pervasive practice of police perjury in New York is probably no different elsewhere around the nation); ... ('From coast to coast, commissions and internal affairs units are being employed to investigate allegations of law enforcement misconduct and corruption.'); Comment, Police Perjury in Narcotics 'Dropsy' Cases: A New Credibility Gap, 60 Geo. L.J. 507, 507 (1971) (recognizing a 'growing problem of police perjury in cases involving narcotics arrests'); Alan M. Dershowitz, Controlling the Cops; Accomplices to Perjury, N.Y. Times, May 2, 1994, at A17 (suggesting that police perjury in the criminal justice system is pervasive); Alan Dershowitz, Police

Perjury Is Rampant, Rochester Times Union, Mar. 27, 1995, at A6 [hereinafter Dershowitz, Police Perjury Is Rampant] (purporting that all objective studies on the topic of police perjury indicate that 'the problem of pervasive police perjury is rampant in every major city in the country'); ... (indicating that, according to defense attorneys, police perjury commonly occurs); ... (quoting a deputy district attorney in the Los Angeles County D.A.'s office as stating, ' "Sure, cops have gotten up there on the stand and lied or made misstatements"')." Gabriel Chin and Scott Wells, "The 'Blue Wall of Silence' as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury," 59 U.Pitt. L. Rev. 233 (Winter 1998), footnote 12.

[5]"Irving Younger, The Perjury Routine, The Nation, May 8, 1967, at 596-97 ('Every lawyer who practices in the criminal courts knows that police perjury is commonplace.');

A. Clear and Convincing Material False Statements:

1. The dispatch call for the license plate was misrepresented.

On direct exam, Officer Snyder stated that Det. Rose Privett,

> "A. ... ran the license plate, and she got back on the radio and said that it returned to Joann and Shawn Washburn.
> "Q. And was that before any officers had approached the van or stopped Shawn Washburn?
> "A. That is correct." (T, 93).

Washburn then introduced an exhibit from the police records that indicated that the license plate was not run until 7:18 or 7:19 p.m. (R, p. 68), which was after Washburn's seizure at 7:05 p.m. Officer Snyder was then asked,

> "Q. Are you sure that the license plate wasn't run until 7:18 p.m. or are you sure that it was run at seven o'clock before the defendant was detained?
> "A. Well, I don't know that - I can't tell you that somebody else at the scene didn't run the plate again." (T, p. 154).

Washburn then called Jerry Gray, the assistant director for the Elkhart City Communications and he was asked,

"Q. Do any of your records indicate that Detective Rose Privett made any license plate check prior to 19:19 (7:19 p.m.) ?
"A. No." (T, 190 and 92).

Additionally, if one hears the tape introduced in the trial court, they will find it obvious that Privett is yelling to officers that "the vehicle matches that subject," not suspect which indicates that Washburn had already been seized.

Snyder responded that he heard the license return from Privett prior to the seizure of the defendant about 7:05 p.m. The records indicated that detective Privett did not call dispatch until 7:19 p.m., which was after the stop. The trial court did note that it was "within minutes" of the stop that police acquired information (R, 99) and that the license check was not run until after the stop (R, 96).

The trial court ignored the police misconduct in their testimony. Without checking the license plate first, the police pulled at least two weapons on a random white man in an hotel parking lot. They had no physical description of Washburn if you accept the Ohio officer Vandemark's

testimony (T, 78-79), or simply a "white male" if one believes Snyder, who was in the court room during the first two Ohio officers' examinations and whose personal knowledge of Morgan's statements was never established, did not simply add that detail as the third witness, which was written in no police report, during the middle of the hearing.

If we take substantive testimony that was first produced in the middle of a suppression hearing and give it the same weight that we give information contained in a police report, what incentive do we give the police to make full and accurate reports? How can a defendant prove an officer is shading his testimony or how can he prove that police are not crafting their testimony in order to defeat a motion to suppress? What more could Washburn do but produce the reports and the communication records from their own police departments? Sure, he could testify, but then he would be sentenced to 2 more levels for obstruction with these officers available to rebut his testimony.

2. <u>The unreasonably delayed dog search</u>:

After seeing Washburn's van enter the Westin Plaza Hotel parking lot around 7:00 p.m. (T, 92), officers seized him outside his van and took his keys around 7:05 (T, 129). Snyder then placed Washburn in a police vehicle about 5 minutes later (T, 120). On direct, Snyder was asked the following:

> "Q. Approximately how long from the time that you spoke to Mr. Washburn until the time that the dog unit arrived? How much time elapsed?
> "A. I would say - I don't have an exact time, but I would say half hour-
> "Q. Okay.
> "A. or less."

Washburn called Egbert Dijkstra, the Elkhart County Assistant Director for 911, (T, 155). Mr. Dijkstra presented the police business records that proved that the dog unit (Ptl. Schotts) did not even begin his route to the Westin Plaza until 8:18 p.m. and did not arrive until 8:25 p.m., about 1 hour and 20 minutes after the initial seizure of Washburn. (T, 76, 78-85). The government then attempted to persuade the court that the dog unit arrived at another, earlier time but that cell

phones were used that would not be recorded. The trial court stated:

> "Mr. Washburn presented police records indicating that the canine unit did not set out for the Weston Plaza until 8:18 p.m. The government countered with evidence that the task force agents on the scene had cell phones and knew the cell number of the dog handler; a cell phone call would not appear on the police records. The government's evidence is unpersuasive in light of the nature of the contact reflected on the records introduced into evidence: it appears more likely than not that the canine unit didn't arrive on the scene for the first time until 8:20 or so, and that Lt. Snyder's recollection that the dog arrived earlier is mistaken." (R, 99).

In light of U.S. v. Place, 462 U.S. 696 (1983), where the court found that a 90 minute detention to secure a drug sniffing dog was per se unreasonable under the 4th Amendment, the timing of a canine sniff is critical to 4th Amendment analysis. If Washburn had not been able to secure the police's own business records, he would have been unable to counter Snyder's testimony and cell phone explanation. If he had testified, he would in all likelihood have received a 2 point sentencing enhancement for

obstruction of justice.[6] This testimony was highly material because a dog sniff is not a search and the government only would have had to have proven reasonable suspicion and not the higher standard of probable cause to justify the search. This cell phone attempted explanation is highly unacceptable and should not be condoned by simply ignoring this misconduct.

B. Additional Suspect Police Testimony:

Washburn asserted ten additional incidents of suspect testimony in its motion to correct error (R, 137-142). This list is probably incomplete. How many false statements can the Court ignore before it takes affirmative steps to deter police misconduct? It may very well be that this all or nothing approach to the exclusionary rule is what motivates

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[6]Counsel for the defendant informed the Court that in pre-trial negotiations, the government had informed counsel that the canine unit was at the scene immediately at 7:00 p.m. (T, p.14). The government did not disagree. Choosing not to risk a 2 point sentencing enhancement for obstruction of justice, the defendant chose not to testify at the suppression hearing.

police perjury in the first place, so what was intended to be a remedy, may have actually become a curse. If the police can commit mass perjury with near impunity, then the Bill of Rights becomes nothing more than a whimsical option of police integrity or lack thereof.

QUESTION 3. In order to deter the trial court success of police perjury, is a new remedy needed in warrantless automobile search exception cases that would limit a court's consideration of probable cause determining facts to those facts that were recorded by police within 48 hours of the search?

The petitioner asserts that one possible remedy would be to require the police in any warrantless search to record in an affidavit police report within 48 hours all of the facts in their possession that support probable cause. This rule would reduce the success of police perjury and would make a warrantless search no more advantageous than a search with a warrant.

For example, in a warrant search, the probable cause facts are limited to the four (4) corners of the affidavit. The police can not "invent" new facts six (6) months later like they did in this case in order to defeat a motion to suppress.

Such a rule would improve the quality of police reports, would reduce "sandbagging" defendants with new information in the midst of a suppression hearing, such as what the government did is this case, and would promote honesty as well as deter the temptation to engage in perjury because "new" facts not previously recorded would not be available for use in a suppression hearing.

QUESTION 4. If the warrantless search in this case were limited to facts recorded within 48 hours of the search and not to those that surfaced for the defense for the first time during the middle of the suppression hearing six (6) months later, would probable cause have existed to seize Washburn and search his van, or even if the District Court properly included all of the new facts that were inserted into the

suppression hearing, did probable cause exist to seize Washburn at gunpoint and search his van without a warrant?

If we limit the probable cause facts to only those that were recorded in police reports within 48 hours, all we have is a taped phone conversation that mentions no drugs other than a margarita, and Morgan's statements that Washburn would arrive at the Westin Plaza hotel at 7:00 p.m. in a white conversion van. In Elkhart, where conversion vans are manufactured, such minimal information is hardly enough to satisfy a "man of reasonable caution" in determining that criminal activity probably is taking place.

Is simply stating information about a male named Washburn from a known drug dealer who had never before been used as an informant, in a white conversion van in Elkhart Co., Indiana sufficient to establish probable cause?

A. Morgan's reliability was never established.

The police had never before used Morgan as an informant (T, 58). A white conversion van in Elkhart County, where conversions van are agreed to be common, is

not sufficient information from an informant whose reliability has not been established or previously tested. In a factually similar case, Alabama v. White, 496 U.S. 325 (1990), the court held that an informant who predicted information about a drug dealer's actions in traveling towards a location at a particular time, only provided reasonable suspicion, not probable cause. In fact, in White, the informant provided much more specific detail in that the informant stated that the vehicle that White would be driving had a broken tail light, yet, that still was insufficient to establish probable cause.

B. The sole hearsay of an unreliable informant is insufficient to establish probable cause.

The trial court found that Morgan was giving information against his penal interests. The Court did not address the reasoning in Newby v. State, 701 N.E.2d 593, 600 (Ind.App. 1998), which held that giving up a supplier is not acting against an informant's penal interests because it does not subject him to any additional criminal liability. The trial court cited no authority for its position that Morgan's

giving up his supplier was a statement against, and not for, his penal interest. Additionally, no evidence exists that the other person who fingered Shawn, Thomas Wright, whose reliability was also never established, had ever even met Shawn in his life. We can not assume anything more than that this other individual, who simply named the defendant, according to the police, did not merely get his information from Morgan. No personal knowledge was ever established for Mr. Wright's statement.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that a Writ of Certiorari issue for review of the order of the Seventh Circuit Court of Appeals.

Respectfully Submitted,

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